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Recent Cases

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CONSTITUTIONAL LAW—MARYLAND UPHOLDS STATUTE PROHIBITING "BLOCKBUSTING" WHETHER OR NOT ENGAGED IN FOR MONETARY GAIN

State v. Wagner, 291 A.2d 161 (Md. 1972)

In *State v. Wagner*,[1] the Court of Special Appeals[2] of Maryland upheld the constitutionality of a state statute prohibiting "blockbusting" statements, *whether or not such statements were made for monetary gain.*[3] The court held that, as long as the state-

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1. 291 A.2d 161 (Md. 1972).

2. MD. ANN. CODE art. 26, § 130 (1966) provides that the Court of Special Appeals is an intermediate court of appeal with jurisdiction over direct appeals from the circuit courts of the counties and from the Criminal Court of Baltimore City in all criminal cases where the sentence is other than death, subject in each case to a further appeal to the Court of Appeals.

3. MD. ANN. CODE art. 56, § 230A (1957) prohibits "blockbusting" by providing as follows:

> (a) It is unlawful for any person, firm, corporation or association, *whether or not acting for monetary gain,* knowingly to induce or attempt to induce another person to transfer an interest in real property, or to discourage another person from purchasing real property, by representations regarding the existing or potential proximity of real property owned, used, or occupied by persons of any particular race, color, religion, or national origin, or to represent that such existing or potential proximity will or may result in: 1. the lowering of property values; 2. a change in the racial, religious, or ethnic character of the block, neighborhood, or area in which the property is located; 3. an increase in criminal or antisocial behavior in the area; or 4. a decline in quality of the schools serving the area (emphasis added).

For provisions similar to those found in the Maryland statute, *see* OHIO REV. CODE ANN. § 4112.02(H)(9) (Page 1969); WIS. STAT. § 101.60(2m) (Supp. 1969). Neither act requires that "blockbusting" representations be based on the profit motive.

ments came within the ambit of those proscribed by the statute and were made by a person while engaged in, and as an integral part of the practice known as "blockbusting," the statute was not violative of the free speech provision of the first amendment.[4]

Wagner had been specifically charged with knowingly attempting to induce[5] an individual to transfer an interest in real property by making the "blockbusting" representations prohibited by the statute.[6] At the trial level, the Criminal Court of Baltimore dismissed the indictment on the basis that it failed to allege that the defendant was acting for monetary gain when making her representations.[7] The trial court held that the statute constituted a reasonable limitation on freedom of speech only to the extent that it prohibited those inducements made by persons acting for monetary gain.[8] The Court of Special Appeals of Maryland reversed the lower court's decision, ordered the indictment reinstated and remanded the case for trial.[9]

"Blockbusting" is the practice of inducing owners of property to sell because of the actual or rumored advent into the neighborhood of a member of a racial, religious or ethnic group.[10] In the classic "blockbusting" situation, homes are bought in a white neighborhood at depressed prices by a speculator and later sold at inflated prices to blacks who have a limited access to the housing market.[11] Because the "blockbuster" is able to create an arti-

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4. 291 A.2d 161, 167 (Md. 1972).

5. *See also* Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969), upholding the constitutioality of 42 U.S.C. § 3604(e), the federal anti-"blockbusting" statute, which equates any attempt to induce a person to sell a dwelling by racial representations with a successful inducement.

6. *See* note 3 *supra.*

7. Brief for Appellant at 3, State v. Wagner, 291 A.2d 161 (Md. 1972).

8. *Id.* at 8. In his decision, Judge Solomon Liss of the Criminal Court of Baltimore expressly adopted the nisi prius opinion of Judge Proctor in State v. Mason, Criminal No. 35899 in the Circuit Court for Baltimore County (1969). *Cf.* United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969) which, in examining the "for profit" limitation of the federal anti-"blockbusting" statute reasoned that the inclusion of statements made in a social and political context, as distinguished from a *commercial* context, *i.e.*, "for profit," would have raised serious first amendment problems. *See* note 70 and accompanying text *infra.*

9. 291 A.2d 161, 167 (Md. 1972).

10. Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761, 762 (1969).

11. *E.g.*, Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 530, 224 N.E.2d 793 (1967).

The *modus operandi* of the typical "blockbuster" consists of direct personal contacts with white homeowners in a neighborhood. By telephone and door to door solicitation, he predicts an influx of "colored," a resulting deterioration of local schools, and an increase of crime in the area. *See* Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969).

Such predictions are often either fabricated or exaggerated. The "blockbuster" usually insists that property values are dropping rapidly and that every day the white homeowner delays will be costly. With enough repetition, his conduct may induce a neighborhood panic, and the once

ficial market, both seller and purchaser lose. Sellers are forced to dispose of their homes at prices well below their fair market worth, while purchasers are compelled to pay exorbitant prices to obtain housing.[12]

Although "blockbusting" is widely condemned[13] it is only recently that attempts have been made to curb the practice. Neighborhood and real estate associations, as well as government at a local, state, and federal level, have all sought to curtail the practice. A summary and evaluation of these attempts will serve to illumine the complexity of the problem and provide an appropriate introduction to the solution offered by the court in *Wagner*.

Efforts by neighborhood associations to prevent "blockbusting" have been confined, for the most part, to the use of educational and persuasive measures to promote neighborhood stabilization and discourage panic selling. But because they lack any real power to force realtors to cooperate, and as they often have difficulty maintaining control over their own membership, neighborhood associations have proved an inadequate antidote to "blockbusting."[14] Self-policing by the real estate industry has also proved ineffective. Sanctions imposed on "blockbusters" have little deterrent value,[15] and even expulsion from a real estate association does little damage to the violator, as membership is voluntary and not essential.[16]

State and local governments have promulgated legislative and administrative measures to curtail "blockbusting."[17] Regulation varies as to both scope and specificity. Some jurisdictions have

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all-white or slightly integrated neighborhood quickly becomes all-black. *See* note 12 *infra*.

The modern "blockbuster" does not always purchase homes for resale himself. Instead, he may serve as an agent in panic sales from white owners to black buyers, skimming off profits from the numerous conditions attendant to transforming a neighborhood. *E.g.* Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

12. Comment, *Blockbusting*, 59 GEO. L.J. 170 (1970); Vitchek, *Confessions of a Blockbuster*, SAT. EVEN. POST, July 14, 1962, at 15.

13. U.S. COMMISSION ON CIVIL RIGHTS IN NEW YORK, ATLANTA, GA., AND CHICAGO, ILL., HOUSING HEARING, 218-19, 224, 226, 379 (1959); U.S. COMMISSION ON CIVIL RIGHTS, REPORT, 516-18 (1959).

14. *E.g.* Keefe v. Organization for a Better Austin, 115 Ill. App. 2d 236, 253 N.E.2d 76 (1969) where it was held that a neighborhood organization cannot compel a "blockbuster" to sign a fair practices agreement.

15. Comment, *Blockbusting*, 59 GEO. L.J. 170 (1970).

16. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 187-90 (1969).

17. *See* 4 U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON HOUSING 122-26 (1961), summarizing state and local anti-"blockbusting" efforts.

statutes defining the practice and banning it outright.[18] Others have sought to limit "blockbusting" indirectly: Massachusetts and Vermont forbid fraudulent representations for the purposes of inducing sales or obtaining listings;[19] municipalities prohibit door to door solicitation except by real estate agents who have applied for a special permit;[20] other cities regulate the size and location of "for sale" signs, thereby curbing one of the more obvious panic-inducing weapons in the "blockbuster's" arsenal.[21]

Another approach to the problem of controlling "blockbusting" is the use of real estate licensing agencies to police the industry.[22] But the statutes creating these commissions often militate against their own effectiveness by requiring that commissioners be recruited exclusively from the membership of the community they are supposed to supervise.[23]

Human relations commissions have also been set up by state and local governments to investigate "blockbusting" and other complaints of discriminatory practices.[24] A major structural defect of most human relations commissions is that though they may initiate investigations, they have no authority to file complaints for the purpose of instituting enforcement proceedings.[25] Although a few states have authority to file complaints, they have, by and large, rarely done so.[26]

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18. *See* note 3 *supra.*

19. MASS. GEN. LAWS ANN. ch. 112, § 87AAA (Supp. 1970); VT. STAT. ANN. tit. 26, § 2295 (1967).

20. *E.g.* Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969). The constitutionality of regulations barring solicitation has been upheld by the Supreme Court in Breard v. Alexandria, 341 U.S. 622 (1961).

21. *E.g.,* Detroit, Michigan, Ordinance 753-F, reprinted in 7 RACE REL. L. RPTR. 1260 (1962); Teaneck, New Jersey, Ordinance 1157, Oct. 16, 1962, reprinted in 7 RACE REL. L. RPTR. 1262 (1962).

22. Statutes authorize these agencies to issue regulations and to sanction violations by suspension or revocation of licenses. *E.g.,* CONN. GEN. STAT. REV. §§ 20-320(11), 20-328 (1969); D.C. CODE ANN. § 45-1403 (1967); N.J. STAT. ANN. § 45:15-1 *et seq.* (1963); N.Y. EXEC. § 296(3) (McKinney Supp. 1969); PA. STAT. ANN. tit. 63, §§ 436, 440 (1968).

23. *See* Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761, 766 (1969).

24. *See, e.g.,* PA. STAT. ANN. tit. 43, §§ 956-57 (1964).

25. *See generally* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process,* 74 YALE L.J. 1171, 1191-93 (1965).

26. *Id.* at 1192. The Pennsylvania commission is a notable exception and has made substantial use of its authority to initiate enforcement proceedings. Evaluating the work of the Pennsylvania Human Relations Commission (prior to 1961, known as the Pennsylvania Fair Employment Practice Commission), Witherspoon finds:

> In its first operating year, the Pennsylvania commission initiated 52 per cent of the complaints it processed. In the second and third years it initiated at least 40 per cent of the complaints processed. In subsequent years the commission has initiated a significant percentage of processed complaints of discrimination in employment, public accommodations and housing. The Pennsylvania commission [also] has . . . [an] . . . excellent record of 'satisfactory adjustments' of complaints through conciliation. . . . The ex-

Prosecution under criminal statutes[27] has produced few cases, presumably because of the difficulty of establishing beyond a reasonable doubt the requisite criminal intent.[28] In addition, there is an acknowledged lack of enthusiasm shared by local prosecutors in bringing white-collar criminals to trial.[29]

Prior to the Fair Housing Act (1968),[30] federal regulation of "blockbusting" was based on the thirteenth amendment[31] and the Civil Rights Act of 1866.[32] In the first federal anti-"blockbusting" suit, *Contract Buyers League v. F. & F. Investment*,[33] a group of black purchasers alleged that a realtor had violated the 1866 Act by charging them higher prices for their homes than he would have charged white buyers in a normal market. The "blockbuster" had reaped inordinate profits from exploiting a system of de facto segregation that he and other realtors had helped create.[34] Relying on the thirteenth amendment and the 1866 Act, the district court held that this discrimination deprived negroes of the same rights as whites to buy real estate.[35] Although the *Contract Buyers* decision afforded relief to the black purchaser, it failed to respond to the plight of the white homeowner who, having been defrauded on the transaction, was unable to avail himself of the protection of either the thirteenth amendment or the 1866 Act.[36]

Congress responded to the need for more comprehensive anti-

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perience of the Pennsylvania Commission indicates that a commission can readily initiate a minimum of 35 to 50 per cent of the total number of complaints processed without loss of efficiency.

27. *See* note 3 *supra*.

28. *See* Comment, *Blockbusting*, 59 GEO. L.J. 170, 174 (1970).

29. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *The Challenge of Crime in a Free Society*, 47-49 (1967).

30. 42 U.S.C. § 3604(e) (Supp. IV, 1969). For the text of the federal anti-"blockbusting" provision see note 37 *infra*.

31. U.S. CONST. amend. XIII provides:

> § 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> § 2. Congress shall have power to enforce this article by appropriate legislation.

32. 42 U.S.C. § 1982 (1964) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

33. 300 F. Supp. 210 (N.D. Ill. 1969).

34. *Id.* at 214.

35. *Id.* at 216. Damages in the amount of the price differential were awarded.

36. *See* New York Times, Mar. 29, 1969, at 23, col. 6, containing an interview with Assistant Attorney General Leonard of the U.S. Department of Justice.

"blockbusting" legislation by passage of the Fair Housing Act of 1968.[37] Victims were provided three avenues of relief: (1) conciliation through the Department of Housing and Urban Development,[38] private actions,[39] and public suits brought by the Justice Department.[40] The first two forms of relief have proved ineffective. H.U.D. suffers from understaffing and a lack of enforcement power under the Act.[41] Also, expenses of litigation discourage civil suits by those who have been "blockbusted." Public action, under the aegis of the Justice Department, has emerged as the most potent remedy in the 1968 Act, because the Attorney General has far greater resources than individual litigants to oversee compliance with injunctive relief.[42]

The constitutionality of the federal anti-"blockbusting" provision has been upheld in several decisions.[43] It has been sustained under the thirteenth amendment as a rational means of effectuating the stated purpose of the Fair Housing Act (1968), which was "to provide, within constitutional limitations, fair housing throughout the United States."[44] The anti-"blockbusting" provision has also been held constitutional under first amendment free speech requirements,[45] as the statements prohibited by the Act must be made "for profit." Had the Act also prohibited statements not "for profit," but made in a "social or political context," serious first amendment problems would have been raised.[46]

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37. 42 U.S.C. § 3604(e) (Supp. IV, 1969) makes it unlawful:

> *For profit*, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin (emphasis added).

38. 42 U.S.C. §§ 3608-3611 (Supp. IV, 1969).

39. *Id.* § 3612.

40. *Id.* § 3613.

41. *See* Comment, *Blockbusting*, 59 GEO. L.J. 170, 178 (1970).

42. *Id.* at 181. There is, however, a major statutory impediment to the effectiveness of the public action. The Attorney General, before he can act, must have:

> reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights granted by this subchapter and [that] such denial raises an issue of general public importance . . . (emphasis added).

42 U.S.C. § 3613 (Supp. IV, 1969).

The minimum number of incidents necessary to create a *pattern or practice* has not been established by the courts, but has been left to the discretion of the trial judge. This would appear logical, as the number would depend on the nature of the right protected and the nature of the ordinary violations of such right. *See* United States v. Mintzes, 304 F. Supp. 1305, 1314 (D. Md. 1969).

43. *E.g.*, Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

44. 42 U.S.C. § 3601 (Supp. IV, 1969). *See* Brown v. State Realty Co., 304 F. Supp. 1236, 1240 (N.D. Gal. 1969); United States v. Mintzes, 304 F. Supp. 1305, 1313 (D. Md. 1969).

45. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

46. *See* United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md.

In *State v. Wagner,* the Court of Special Appeals confirmed the validity of a Maryland statute which goes beyond federal anti-"blockbusting" legislation, by not requiring the "blockbuster" to act *for profit.* When the prohibited statements come within the ambit of the statute and are made by a person "while engaged in, and as an integral part" of the practice known as "blockbusting," the court held that the Maryland act does not violate the free speech provision of the first amendment.[47]

Interpreting the statute in the light of its preamble, the *Wagner* court sought to justify the legislature's action by stressing the public importance of broadly phrased anti-"blockbusting" provisions. The court reasoned that the Maryland Legislature did not intend to limit the statute's application to those who would engage in "blockbusting" only for financial gain, because it undoubtedly wished to protect the public against the ingenuity of those whose participation in the condemned practice could not be readily identified with a financial motivation.[48]

To the extent that the practice of "blockbusting" involves the making of the representations proscribed in the Maryland statute, *even when not for monetary gain,* it is "clearly beyond the protection of the first amendment," according to the *Wagner* court.[49] In support of this proposition, the *Wagner* court relied upon a federal district court decision, *United States v. Bob Lawrence Realty, Inc.*[50] Clearly, *Lawrence* provides only questionable authority on this point. Although the court in *Lawrence* did hold that the federal anti-"blockbusting" statute[51] was not violative of first amendment rights,[52] it based its decision on the theory that the federal statute does not make mere speech unlawful, but does prohibit "*economic exploitation* of racial bias and panic selling."[53]

1969), wherein the court states:

> The words 'for profit' . . . were evidently included in § 3604 (e) to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a *commercial context,* where the person making the representations hopes to obtain some *financial gain* as a result of the representations. . . . The inclusion of statements made in social or political contexts would have raised serious first amendment problems (emphasis added).

47. State v. Wagner, 291 A.2d 161, 167 (Md. 1972).
48. *Id.* at 166.
49. *Id.*
50. 313 F. Supp. 870 (N.D. Ga. 1970).
51. *See* note 37 *supra.* It is important to distinguish between the federal statute which requires a "blockbuster" to act "for profit" and the Maryland statute which does not. *See* note 3 and accompanying text *supra.*
52. 313 F. Supp. 870, 872 (N.D. Ga. 1970).
53. *Id. Accord,* United States v. Hunter, 324 F. Supp. 529, 533 (D. Md. 1971).

Thus, it would appear that *Lawrence* and the instant case are easily distinguishable. In validating a statute not limited to proscribing representations made for monetary gain, the *Wagner* decision strays beyond the *economic exploitation* factor deemed essential in *Lawrence*.[54]

In further support of its interpretation of the first amendment, the *Wagner* court stated that:

> [I]t has long been fundamental that where speech is an integral part of unlawful conduct, it has no constitutional protection.[55]

Authority for this proposition is sought from a 1948 United States Supreme Court decision, *Giboney v. Empire Storage and Ice Co.*,[56] where an ice peddlers' union was picketing wholesale ice distributors in an effort to induce the latter not to sell to non-union peddlers. Such agreement, if consummated, would have been illegal under a Missouri statute declaring combinations in restraint of trade to be unlawful.[57] The Supreme Court unanimously held, in an opinion written by Mr. Justice Black, that the state statute was applicable to labor unions, and that the right of free speech does not extend to an exercise in furtherance of an illegal end—in this case a *commercial* agreement to sell to union members only. It is submitted that *Giboney* is distinguishable from *Wagner* on the basis that the unlawful conduct that *Giboney* ruled was unprotected by the first amendment is based on *economic exploitation*, in that the union was attempting to restrain trade and monopolize the profits of the retail ice industry. *Wagner*, however, restrains conduct, *even when it is not based on monetary gain*.[58] Thus, *Giboney* is not convincing support for *Wagner's* conclusion that statements not made in a commercial context are excludable from the protection of the first amendment.

Wagner further asserts that its principle, that speech has no constitutional protection when it is an integral part of unlawful conduct, has been previously applied in support of a Chicago anti-"blockbusting" ordinance.[59] The ordinance forbids real estate

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54. *See* note 46 *supra*. *See* United States v. Hunter, 324 F. Supp. 529, 533 (D. Md. 1971) for a discussion of those areas in which free speech may be constitutionally limited. *See also* Comment, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

55. 291 A.2d 161, 166 (Md. 1972).

56. 336 U.S. 490 (1948). The Court in *Giboney* stated that:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.

Id. at 498.

57. MO. REV. STAT. § 8301 (1939).

58. 291 A.2d 161, 167 (Md. 1972).

59. Chicago, Ill., Ordinance to Prohibit "Panic Peddling" by Real Estate Brokers, Sept. 11, 1963, as cited in Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 530, 224 N.E.2d 793 (1967).

brokers to solicit sales of property from Caucasians on the ground that loss of value will ensue because Negroes have moved or are about to move into a neighborhood.[60] *Chicago Real Estate Board v. City of Chicago*,[61] citing *Giboney*, declared that "blockbusting" by brokers, as prohibited in the Chicago ordinance, was the type of "unlawful conduct" not entitled to first amendment protection. By its express limitation to brokers, the Chicago ordinance and its judicial affirmation are seeking to regulate the conduct only of the real estate industry. The Maryland statute affirmed in *Wagner*, however, is distinguishable upon the basis that it specifically deletes the profit motive, indigenous to brokers, and is applicable to "*any* person, firm, corporation or association" engaging in the practice of "blockbusting."[62] The *Chicago* case, limited as it is to a profit-seeking class of individuals, is therefore inappropriate support for *Wagner*, which excludes nearly everyone from first amendment protection who "blockbusts" or attempts to "blockbust," whether or not for monetary gain.[63]

In further support of its contention that constitutional guarantees of free speech are not available to "blockbusters," even when not acting for monetary gain, *Wagner* utilizes two recent federal decisions, *United States v. Hunter*[64] and *United States v. Mintzes*.[65] But *Hunter*, in upholding the constitutionality of a provision[66] of the 1968 Fair Housing Act, expressly states that: "the restrictions of § 3604(d) limit speech only in a *commercial context*, not in relation to the dissemination of ideas."[67] *Hunter*, restricted as it is to limitations on free speech in a discriminatory *commercial* context, is thus also inapplicable to the anti-"blockbusting" ar-

60. *Id.* at 797. The ordinance further prohibits the distribution by brokers of any written material on statements designed to induce the owner to sell or lease his property for such reasons.

61. 36 Ill. 2d 530, 224 N.E.2d 793 (1967).

62. State v. Wagner, 291 A.2d 161, 162, 166-67 (Md. 1972).

63. *See* United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969) and United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870 (N.D. Ga. 1970), which both support the proposition that whereas economic exploitation of racial bias and panic selling may not be entitled to first amendment protection, mere speech is.

64. 324 F. Supp. 529 (D. Md. 1971).

65. 304 F. Supp. 1305 (D. Md. 1969).

66. 42 U.S.C. § 3604(d) makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

67. 324 F. Supp. 529, 533 (D. Md. 1971) (emphasis added).

gument in *Wagner*.[68]

The *Mintzes* decision provides even less support for the *Wagner* court than *Hunter*. Construing the words "for profit," as used in the federal anti-"blockbusting" statute,[69] *Mintzes* held that:

> the words were evidently included . . . to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a *commercial context*, where the person making the representations hopes to obtain some *financial gain* as a result of the representations. The inclusion of statements made in a social or political context would have raised serious first amendment problems.[70]

The *Mintzes* decision, therefore, does not corroborate the Maryland court's holding that the profit motive is not fundamental to the exclusion of "blockbusting" representations from the protection of the first amendment. *Mintzes* would be more appropriately cited for the proposition that the exclusion of the requirement of a profit motive from an anti-"blockbusting" provision "raise[s] serious first amendment problems."

The Maryland anti-"blockbusting" statute,[71] in attempting to extend the purview of the federal act[72] by foregoing the necessity of proof of profit motive, has raised substantial first amendment questions. In its desire to consecrate legislative action, Maryland's Court of Special Appeals in *Wagner* has failed to recognize first amendment conflicts. Authority summoned to affirm its singular holding is distinguishable both on facts and legal principles. The Wagner court, in its zeal to eradicate the admittedly pernicious practice of "blockbusting," has permitted the Maryland Legislature to impinge upon a citizen's right to free speech as guaranteed in the first amendment.

JAY ROBERT STIEFEL

68. *See generally* Comment, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

69. *See* note 37 *supra*.

70. 304 F. Supp. 1305, 1312 (D. Md. 1969) (emphasis added). *Accord*, United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870, 872 (N.D. Ga. 1970).

71. *See* note 3 *supra*.

72. *See* note 37 *supra*.

CRIMINAL LAW—PSYCHIATRIC EVIDENCE RULED ADMISSIBLE IN MURDER PROSECUTION TO DETERMINE WHETHER DEFENDANT ACTED IN HEAT OF PASSION

Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972)

The Pennsylvania Supreme Court in *Commonwealth v. McCusker*[1] held that "psychiatric evidence is admissible in a murder prosecution for the limited purpose of determining whether a defendant acted in the heat of passion."[2] Although the court expressly stated that the M'Naghten standard remains the test for legal sanity,[3] psychiatric evidence is now admissible to show diminished capacity[4] in an attempt to prove that, in response to adequate provocation, an act was done in the heat of passion, even though the difference between right and wrong was not obscured by the defendant's mental disorders.

In *McCusker*, the defendant was found guilty of the second-degree murder of his wife. Although two eyewitnesses saw the actual slaying, they were not present immediately prior to the slaying. Consequently, only the defendant was able to testify as to the events which immediately preceded the killing. The defense attempted unsuccessfully to admit into evidence the testimony of two psychologists and two psychiatrists. The testimony would have established that the defendant was impassioned at the time of the offense. The doctors would have stated that the passion was the result of the defendant's mental disorders[5] coupled with

1. 448 Pa. 382, 292 A.2d 286 (1972).
2. *Id.* at 384, 292 A.2d at 287.
3. *Id.* at 393, 292 A.2d at 292.
4. To show diminished capacity is to indicate that a defendant was mentally incapable of forming the requisite higher intent, and the defendant can therefore be held responsible only for the intent actually formed. For example, a defendant mentally unable to form the first degree specific intent to kill could at most be found guilty of second degree murder. *See* authority cited notes 20-22 and accompanying text *infra*. The majority opinion does not state that the diminished capacity doctrine, or any other doctrine is adopted. Justice Eagen, in the concurring and dissenting opinion in which Justice O'Brien joined, believed the majority's extension of admissibility was the adoption of the diminished responsibility doctrine. *Id.* at 396, 292 A.2d at 293.
5. The types of mental disorders which may be shown are not specified in the majority opinion. Presumably, any psychiatric testimony which bears on the probability of the defendant having reacted in a heat of passion is admissible.

(1) his recent discovery, within a month prior to the slaying, of Mrs. McCusker's meretricious relationship with the defendant's stepbrother; (2) Mrs. McCusker's threat, immediately before the crime, to leave the defendant and retain custody of their only child; and (3) the defendant's knowledge, within minutes of the crime, that Mrs. McCusker was perhaps pregnant with his stepbrother's child.[6] Because the trial court did not allow the defendant to introduce psychiatric evidence relevant to whether the slaying was committed in the heat of passion,[7] the Pennsylvania Supreme Court reversed the judgment and granted a new trial.

In essence, by permitting psychiatric evidence to prove heat of passion, the supreme court has ruled by implication that psychiatric testimony is admissible to negate malice aforethought, the distinguishing element between murder and manslaughter.[8] Once adequate provocation and insufficient cooling time are shown,[9] psychiatric evidence is admissible on the question of whether the defendant actually acted in the heat of passion, or whether in fact the defendant "cooled" and acted with malice aforethought.[10] The evidence is therefore defensively useful to prove the defendant's act was voluntary manslaughter, which although still an intentional killing, results from adequate provocation which produces a heat of passion in the reasonable man and causes him to react without "cooling" and reflecting.[11] But only after both the provocation and lack of cooling time have been found objectively to be adequate to arouse the reasonable man does the psychiatric evidence become relevant to ascertain the defendant's subjective response to the provocation.[12] Psychiatric testimony may then

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6. Commonwealth v. McCusker, 448 Pa. 382, 388-89, 292 A.2d 286, 289-90 (1972).

7. *Id.* at 385, 292 A.2d at 288.

8. Malice aforethought is the subjective factor essential to the crime of murder and includes hatred of the victim, wickedness of disposition, hardness of heart, cruelty, reckless disregard of consequences, or unmindfulness of social duty. Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Wucherer, 351 Pa. 305, 41 A.2d 574 (1945); Commonwealth v. McLaughlin, 293 Pa. 218, 142 A. 213 (1928). Malice aforethought is an element of murder in either degree and distinguishes murder from manslaughter, whereas an intent to kill distinguishes first degree murder from second degree. Commonwealth v. Gibson, 275 Pa. 338, 119 A. 403 (1923).

9. Only in very rare and exceptional cases can a court hold as a matter of law that a defendant had adequate cooling time. Commonwealth v. Dews, 429 Pa. 555, 239 A.2d 382 (1968). The *McCusker* trial court found sufficient cooling time had elapsed.

10. Commonwealth v. McCusker, 448 Pa. 382, 390, 292 A.2d 286, 290 (1972).

11. *Id.* at 389-90, 292 A.2d at 290.

12. *Id.* at 384, 387-90, 292 A.2d at 287, 289-90. Adequacy of provocation and lack of cooling time, because they are based on the reasonable man standard, are purely objective tests. Commonwealth v. Flax, 331 Pa. 145, 155-56, 200 A. 632, 636 (1938); Jacobs v. Commonwealth, 121 Pa. 586, 15 A. 465 (1888). A cumulative series of related events may constitute

be introduced to indicate whether the defendant reacted in a heat of passion, which includes any of the emotions of the mind known as anger, rage, sudden resentment, and terror.[13]

It is important to note the limited purpose for which psychiatric evidence is admissible under the *McCusker* decision. Because the role of psychiatric testimony is limited to determining whether the defendant acted in the heat of passion, the evidence is not admissible under *McCusker* to aid in determining whether the defendant formed the specific intent to kill[14] required by statute to convict for first degree murder. The Pennsylvania Supreme Court has expressly refused to admit psychiatric evidence to determine whether a defendant was capable of having the specific intent to kill of first degree murder, where insanity is not put forth as a complete defense.[15] As the Commonwealth bears the burden of proving the defendant's act was first degree murder,[16] psychiatric testimony if admissible could aid the defendant in proving the lesser offense of second degree murder.[17]

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sufficient provocation. Commonwealth v. McCusker, 448 Pa. 382, 389, 292 A.2d 286, 290 (1972).

13. Commonwealth v. Colandro, 231 Pa. 343, 350-51, 80 A. 571, 574 (1911). Lay evidence, as well as professional, is admissible on the defendant's state of mind at the time of the offense where defendant asserts he acted in the heat of passion. Commonwealth v. McCusker, 448 Pa. 382, 391, 292 A.2d 286, 290-91 (1972).

14. The intent to kill, distinctly formed for even a moment, is sufficient to supply the qualities of willfulness, deliberation, and premeditation otherwise essential by statute to murder in the first degree. Commonwealth v. Maloney, 365 Pa. 1, 73 A.2d 707 (1950); Commonwealth v. Daynarowicz, 275 Pa. 235, 119 A. 77 (1922).

15. Commonwealth v. Tomlinson, 446 Pa. 241, 284 A.2d 687 (1971); Commonwealth v. Weinstein, 442 Pa. 70, 274 A.2d 182 (1971); Commonwealth v. Rightnour, 435 Pa. 104, 253 A.2d 644 (1969); Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); Commonwealth v. Ahearn, 421 Pa. 311, 218 A.2d 565 (1966). Prior to 1966, a series of lower court decisions permitted a psychiatrist to give expert opinion on a defendant's state of mind, and on appeal, the Pennsylvania Supreme Court merely questioned the weight to be given psychiatric evidence but did not rule the evidence inadmissible. Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963); Commonwealth v. Jorden, 407 Pa. 575, 181 A.2d 310 (1962); Commonwealth v. Tyrell, 405 Pa. 210, 174 A.2d 852 (1961); Commonwealth v. Woodhouse, 401 Pa. 242, 164 A.2d 98 (1960); Commonwealth v. Neill, 362 Pa. 507, 67 A.2d 276 (1949). Other than at the trial stage, Pennsylvania recognizes the validity of psychiatric evidence to determine a defendant's capacity to stand trial. Commonwealth v. Novak, 395 Pa. 199, 150 A.2d 102 (1959); Commonwealth v. Moon, 383 Pa. 18, 23, 117 A.2d 96, 99 (1955). Psychiatric evidence is also admitted as an aid in determining a penalty after guilt has been established. Commonwealth v. Wooding, 355 Pa. 555, 559, 50 A.2d 328, 329 (1947); Commonwealth v. Stabinsky, 313 Pa. 231, 238, 169 A. 439, 442 (1933).

16. Commonwealth v. Flax, 331 Pa. 145, 200 A. 632 (1938).

17. The testimony would show that although a defendant acted with malice aforethought, deliberation and premeditation were lacking.

Aside from the evidentiary impact of the *McCusker* decision, the case also indicates that Pennsylvania has partially adopted the doctrine of diminished capacity. While the majority of states do not recognize diminished capacity, a strong minority viewpoint permits evidence of mental disorder to be admitted under the doctrine on the question of whether the defendant possessed the requisite *mens rea* for the crime alleged.[18] Most of the minority do not follow the *McCusker* limitation on admissibility of psychiatric evidence to differentiate solely between the murder and manslaughter *mens rea* (malice aforethought and heat of passion), but also permit the evidence to aid in the first-second degree intent determination.[19] Diminished capacity, it should be noted, is not the equivalent of diminished responsibility. The latter doctrine admits psychiatric evidence to effect a mercy reduction of the offense from murder to manslaughter not because a defendant completely failed to achieve the requisite higher mental intent, but solely because of a defendant's weakened psychiatric ability to resist the higher mental intention he possessed.[20] The mercy reduction recognizes no responsibility for the greater crime even though all the elements of the crime are present,[21] and this is contrary to the doctrine of diminished capacity which admits psychiatric evidence to indicate and hold the defendant responsible for whatever mental intent he achieved.[22]

Several factors support the view that the Pennsylvania Supreme Court in *McCusker* adopted a limited version of the doctrine of diminished capacity. The *McCusker* court, for instance, permitted psychiatric evidence on the issue of whether the defendant possessed the mental intent of voluntary manslaughter (heat

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18. In nineteen other jurisdictions where the question has been considered, psychiatric evidence is admissible to some extent on the issue of intent. Annot. 22 A.L.R.3d 1228, 1239 (1968). Nine other jurisdictions and the District of Columbia have refused to admit the evidence when the question arose. *Id.* at 1235. The doctrine has been almost exclusively limited, however, to the intentional crimes of murder and manslaughter.

19. *See, e.g.*, State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Di Paolo, 34 N.J. 279, 168 A.2d 401 (1961); Battalino v. People, 118 Colo. 587, 199 P.2d 897 (1948).

20. A. GOLDSTEIN, THE INSANITY DEFENSE, 191-202 (1967); J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE, 532-36 (2d ed. 1965); F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 355-57 (1961).

21. *Id.*

22. *Id.* That Pennsylvania already recognized diminished responsibility to some extent is seen in Commonwealth v. Hoffman, 439 Pa. 348, 266 A.2d 726 (1970). It was held that conviction of voluntary manslaughter was proper although the evidence did not support a verdict of guilty on such charge in that it did not establish that the defendant acted while under the influence of passion engendered by sufficient legal provocation. *See also* the dissenting opinion in Commonwealth v. Pavillard, 421 Pa. 571, 577, 220 A.2d 807, 810 (1966), which indicates that the trial judge should charge voluntary manslaughter in every murder case.

of passion).[23] This application of the evidence, although limited to voluntary manslaughter, is the same as under the doctrine of diminished capacity, which is similarly concerned with holding the defendant responsible for whatever mental intent he actually possessed.[24]

Additional evidence of the acceptance of the doctrine is the incorporation of New Jersey precedent which espouses the diminished capacity standard.[25] In *State v. Di Paolo*,[26] the trial court admitted psychiatric evidence, and the defendant was convicted of first degree murder. On appeal, the New Jersey Supreme Court held that evidence of mental illness is competent upon the issue of whether the crime is first or second degree murder.[27] The court stated:

> Actually the question is simply whether there shall be excluded evidence which merely denies the existence of facts which the State must prove to establish that the murder was in the first degree. . . . The capacity of an individual to premeditate, to deliberate, or to will to execute a homicidal design, or any deficiency in that capacity, may bear upon the question whether he *in fact* did so act. Hence evidence of any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did *in fact* occur must be accepted.[28]

New Jersey clearly utilizes a diminished capacity standard as mental disorder is relevant in the consideration of the *mens rea* which a defendant achieved and for which he will be held responsible. In *Di Paolo*, the admissibility of psychiatric evidence was not limited to the murder-manslaughter distinction, since the evidence was admitted in an unsuccessful attempt to negate willfulness and premeditation. The Pennsylvania Supreme Court's citation to *Di Paolo* indicates the court's adoption of a diminished capacity theory and its willingness to apply the doctrine in the future.

Further indication of the Pennsylvania court's adoption of a diminished capacity standard is provided by the other authority upon which the court relied in *McCusker*. The cases were cited by the court to justify the application of the diminished capacity doc-

23. Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972).
24. *See* authority cited at note 20 *supra*.
25. Commonwealth v. McCusker, 448 Pa. 382, 393, 292 A.2d 286, 292 (1972).
26. 34 N.J. 279, 168 A.2d 401 (1961).
27. *Id.* at 295, 168 A.2d at 409.
28. *Id.* at 294-95, 168 A.2d at 409 (emphasis supplied).

trine to the murder-manslaughter question,[29] but the factual circumstances of each decision were concerned with the first-second degree distinction. In *People v. Henderson*,[30] the California Supreme Court permitted the use of psychiatric evidence to determine whether the defendant was capable of forming the requisite *mens rea* of first degree murder. Similarly in *Battalino v. People*,[31] the Colorado Supreme Court, under the aegis of statutory law, authorized expert testimony in reference to a defendant's mental condition and his resultant disability "to form the specific intent essential"[32] thereby permitting psychiatric evidence to indicate second rather than first degree murder. Finally, the Iowa Supreme Court in *State v. Gramenz*[33] sustained a lower court's failure to instruct on the requirements to reduce murder to involuntary manslaughter, although the only evidence offered by the defendant tended not to negate malice aforethought, but to negate premeditation and deliberation.

The *McCusker* court's citation of these other jurisdictions which apply the diminished capacity standard to first-second degree intent, indicates that Pennsylvania has adopted, although only paritally, the doctrine of diminished capacity. Justice Eagen in dissent[34] is correct in contending that the *McCusker* decision "opens the door"[35] to the admission of psychiatric evidence. The door is partially opened, however, under the doctrine of diminished capacity rather than diminished responsibility, as the defendant remains responsible for whatever mental intent—malice aforethought or heat of passion—which he possessed at the time of the killing.

It is unlikely that Pennsylvania will continue to limit the diminished capacity doctrine solely to the heat of passion determination. The limited embracement of the doctrine appears to be necessitated only by the facts of *McCusker*. It is submitted, consequently, that the partial acceptance of diminished capacity should be extended in the future to admit psychiatric evidence to determine willfulness, premeditation, and deliberation—the elements of the specific intent to kill of first degree murder. Extension is warranted because if psychiatric evidence is relevant and probative to determine heat of passion,[36] the evidence is just as relevant and

29. Commonwealth v. McCusker, 448 Pa. 382, 393, 292 A.2d 286, 292 (1972).
30. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).
31. 118 Colo. 587, 199 P.2d 897 (1948).
32. COLO. REV. STAT. ANN. § 39-8-1 (1963).
33. 256 Iowa 134, 126 N.W.2d 285 (1964).
34. Commonwealth v. McCusker, 448 Pa. 382, 395, 292 A.2d 286, 293 (1972).
35. *Id.* at 396, 292 A.2d at 293.
36. The court in *McCusker* accepts psychiatric evidence as relative and probative for three reasons: (1) the familiar argument that psychiatry has come-of-age as a modern medical science; (2) psychiatric evidence

probative in regard to the specific intent to kill as both issues are equally subjective. The jurisdictions cited in the text of the *McCusker* opinion as having similar admissibility standards for psychiatric testimony in fact do not limit the evidence to the heat of passion, but admit the evidence on the issue of specific intent to kill.[37] Furthermore, prior to 1966, psychiatrists were permitted by Pennsylvania courts to give expert opinion on a defendant's state of mind and capacity for willfulness, premeditation, and deliberation.[38] Those decisions subsequent to 1965 which denied admissibility of psychiatric testimony on the question of specific intent to kill are not significantly distinguished in the *McCusker* majority opinion.[39] Some of the justices in the *McCusker* majority in fact dissented in those decisions subsequent to 1965 which denied admissibility.[40] Finally, because in Pennsylvania voluntary intoxication when sufficient to deprive the mind of the power to form a specific intent to kill precludes a finding of first degree murder,[41]

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is used at other stages of the Pennsylvania judicial process; (3) the anomaly that the evidence is received at the trial stage under the complete defense of insanity, but not under the partial defense of heat of passion. *Id.* at 287, 291, 292 A.2d at 385, 391-92.

37. *See* authority cited note 19 *supra.*

38. *See* note 15 *supra.*

39. The decisions, *see* note 15 *supra,* are distinguished merely by the statement that they "dealt with the issue of whether a defendant could introduce psychiatric evidence to show he lacked the capacity to deliberate and premeditate. Moreover, those cases regarded the competency of psychiatric testimony with a rigidity which has been constructively criticized. . . ." Commonwealth v. McCusker, 448 Pa. 382, 387, 292 A.2d 286, 288-89 (1972).

40. Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972) (majority opinion by Roberts, J.; concurring and dissenting opinion by Eagen, J., in which O'Brien, J. joined); Commonwealth v. Tomlinson, 446 Pa. 241, 284 A.2d 687 (1971) (majority opinion by Bell, C.J.; concurring opinion by Barbieri, J.; dissenting opinion by Roberts, J., in which Jones and Pomeroy, JJ., joined); Commonwealth v. Weinstein, 442 Pa. 70, 274 A.2d 182 (1971) (opinion in suport of affirmance of judgment by Bell, C.J.; Eagen and O'Brien, JJ., concurred in the result; opinion in support of reversal of judgment by Roberts, J., in which Jones and Pomeroy, JJ., joined); Commonwealth v. Rightnour, 435 Pa. 104, 253 A.2d 644 (1969) (opinion in support of affirmance of judgment by Bell, C.J.; opinion in support of reversal of judgment by Roberts, J., in which Jones, J., joined; Cohen, J., dissented); Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967) (majority opinion by Eagen, J.; concurring opinion by Bell, C.J.; dissenting opinion by Roberts, J.; Cohen, J., dissented); Commonwealth v. Ahearn, 421 Pa. 311, 218 A.2d 561 (1966) (majority opinion by Bell, C.J.; dissenting opinion by Roberts, J., in which Jones, J., joined; dissenting opinion by Cohen, J.).

41. Commonwealth v. Mosley, 444 Pa. 134, 279 A.2d 174 (1971); Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970); Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Brabham, 433 Pa. 491, 252 A.2d 378 (1969); Commonwealth v. McCausland, 348 Pa. 275, 35 A.2d 70 (1944).

it seems no logical or compelling reason can be found why psychiatric evidence should not be admissible to establish a similar mental incapacity on the part of a defendant in order to preclude a conviction of first degree murder.[42]

Pennsylvania thus has three separate standards in regard to the admissibility of psychiatric evidence in murder trials: (1) the M'Naghten standard where insanity is plead; (2) the *McCusker* diminished capacity standard which permits psychiatric evidence to be admitted to determine whether a defendant subjectively reacted in the heat of passion to objectively adequate provocation; and (3) the first-second degree standard which admits no psychiatric testimony to aid in the determination of the degree of murder. Actually, no incongruity exists in simultaneously having both the M'Naghten and *McCusker* standards, as both permit psychiatric testimony to show the intent formed and hold the defendant responsible only for the mental intent possessed. An incongruity does exist, however, in only partially accepting the diminished capacity doctrine and in not admitting psychiatric evidence on the first-second degree determination.[43] Indeed, other states have successfully adopted a broader diminished capacity standard for use in conjunction with the M'Naghten insanity test.[44]

It is apparent, therefore, that Pennsylvania in *McCusker* has partially adopted a standard of diminished capacity. Where adequate provocation and insufficient cooling time can be proved, in many instances defendants will attempt to introduce psychiatric testimony to show some type of mental problem in hopes of lowering the offense from murder to manslaughter by proving the killing was committed in the heat of passion. Since the burden is always on the Commonwealth to prove that the defendant formed the requisite *mens rea* of malice aforethought,[45] the defendant can introduce evidence of his diminished capacity and resultant heat of passion reaction in order to rebut the Commonwealth's murder case without any prior formal plea or claim of insanity—usually a distinct tactical advantage. Increased use of psychiatric evidence will thus occur, and the use will become even greater if the evidence becomes admissible on the first-second degree murder intent. Indeed, no sufficient rationale, other than an arbitrary one, can be found to sustain a continued limitation on the admissibility of psychiatric evidence solely to determine whether a defend-

42. This statement is especially accurate when the involuntariness of mental disorder is compared with the voluntariness of intoxication. Note, *Commonwealth v. Ahearn: Psychiatric Testimony Ruled Inadmissible in Murder Trial to Show Lack of Deliberation and Premeditation*, 71 DICK L. REV. 100 (1966).

43. The reasons for the incongruity are enumerated in the text accompanying notes 36-42 *supra*.

44. *See* authority cited note 19 *supra*.

45. *See* authority cited note 16 *supra*.

ant acted in the heat of passion.[46] An extension of admissibility to include the statutory degrees of murder is the next logical step, and the extension will be the equivalent of full adoption in murder prosecutions of the doctrine of diminished capacity.

DAVID R. ESHELMAN

46. *See* text accompanying notes 36-42 *supra.*

CONSTITUTIONAL LAW—SELF-INCRIMINATION AND THE COMPULSORY PSYCHIATRIC EXAMINATION OF A CRIMINAL DEFENDANT ORDERED FOR THE INDETERMINATE COMMITMENT OF THE DEFENDANT TO A MENTAL INSTITUTION

McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972)

Edward McNeil was tried and convicted in a Maryland court on two charges of assault.[1] Although no psychiatric issues were raised at the trial, the sentencing judge asked for a psychiatric evaluation of McNeil. He was sentenced to five years in prison, and on the recommendation of the court's medical officer, he was further ordered to Patuxent Institution[2] for a determination of whether he was a defective delinquent.[3] If found to be a defective delinquent, he would be kept at Patuxent for treatment for an indefinite period, without regard to the length of his original sentence.[4]

Under the statutory procedure, a defendant is examined by the Patuxent staff, including a psychiatrist. A report on the accused's status must be filed no later than six months from the date he was transferred to the institution or before expiration of his sentence, whichever first occurs.[5] If the report indicates the accused is a defective delinquent, a hearing is then held with counsel and jury to determine whether the accused should be committed to Patuxent.[6]

However, in the situation where an accused refuses to cooperate with the examining staff, the Maryland courts have construed this statute to allow detention until a determination can be made.[7] McNeil refused to answer the psychiatrist's questions

1. Assault on a public officer and assault with intent to rape.
2. Patuxent Institution was established for the specialized treatment of defective delinquents. MD. ANN. CODE, art. 31B, § 1(a) (Supp. 1971).
3. MD. ANN. CODE, art. 31B, § 5 (Supp. 1971) defines a defective delinquent as:

> an individual who, by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

4. MD. ANN. CODE, art. 31B, § 9(b) (Supp. 1971).
5. MD. ANN. CODE, art. 31B, § 7(a) (Supp. 1971).
6. MD. ANN. CODE, art. 31B, § 8 (Supp. 1971).
7. State v. Musgrove, 241 Md. 521, 217 A.2d 247 (1966).

or cooperate.[8] As a result, no report was filed on his status, and therefore no hearing was held, although his original term of five years in prison had expired.[9] The trial court denied post-conviction relief[10] on the basis of a provision in the Defective Delinquency Act that authorizes custody of the accused by Patuxent until a report is completed, without regard to whether his criminal sentence has expired.[11]

The United States Supreme Court agreed with McNeil that the state no longer had power to detain him. They held that confinement in a mental institution for an evaluation for a period which is in fact indeterminate and long-term cannot rest on a mere *ex parte* order but must be surrounded with the appropriate due process safeguards including a judicial determination that such confinement is warranted.[12] In resolving this particular claim, the Court had little difficulty.[13] The Court in *McNeil* relied on *Jackson v. Indiana,*[14] in which it was determined that an incompetent could not be held for a long-term, indefinite period until he became "competent" to stand trial. Such indeterminate confinements were held not to be warranted without appropriate due process safeguards.[15] As long as the duration of confinement is strictly limited, detentions by the state through proceedings that are surrounded with lesser due process requirements are not invalidated.[16]

The majority opinion focused solely on the state's continued confinement of the petitioner, and ignored the action of the petitioner, that is, his failure to cooperate with the examining psychiatrist. As a result part of the petitioner's claim was not fully dealt with by the Court. At the heart of McNeil's appeal was the question whether he could withhold cooperation under claim of the fifth amendment right against self-incrimination. The majority declined to discuss this claim and, instead, focusing on the con-

8. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 246 (1972).
9. *Id.*
10. *Id.* at 248.
11. MD. ANN. CODE, art. 31B, § 6(e) (Supp. 1971).
12. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-250 (1972).
13. In his concurring opinion, Mr. Justice Douglas simply states:
> It is elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard. . . .

Id. at 257.
14. 406 U.S. 715 (1972).
15. *Id.* at 738.
16. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-250 (1972).

tinued detention by the state, attacked the state's argument that refusal to cooperate with psychiatric examiners was analogous to civil contempt.[17] The majority stated that:

> Petitioner claims that he has a right under the Fifth Amendment to withhold cooperation, a claim we need not consider here. But putting that claim to one side, there is nevertheless a fatal flaw in the State's argument. For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt. At such a hearing it could be ascertained whether petitioner's conduct is willful, or whether it is a manifestation of mental illness, for which he cannot fairly be held responsible. . . . Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply. . . . Moreover, a hearing would provide the appropriate forum for resolution of petitioner's Fifth Amendment claim.[18]

The prisoner may still be confined for an indeterminate period of time for refusal to answer, not on a theory analogous to civil contempt, but by an actual civil contempt order.[19] Therefore, a hearing has little substance without a determination by the United States Supreme Court of the fifth amendment's applicability to those refusing to answer psychiatric questions. A hearing will only coerce the criminal defendant to submit to the court ordered psychiatric examination.

Although the majority refused to consider the fifth amendment claim, they did not reject it either.[20] The majority opinion indicates that the Court positively reaffirms its earlier extensions of procedural due process into proceedings for commitment of criminal defendants to mental institutions.[21] The development of these extensions may possibly encompass the privilege against self-incrimination.

The concurring opinion by Justice Douglas in *McNeil*[22] squarely states that the petitioner need not cooperate with the psychiatrist if doing so would result in a surrender of his right against self-incrimination.[23] Though novel, this position is not a surprising one. In recent years the United States Supreme Court has rejected lax state procedures for the commitment of criminals to mental institutions.[24] The landmark case of *Specht v. Patterson*[25] stated

17. *Id.* at 250.
18. *Id.* at 250-251.
19. *Id.*
20. *Id.* at 250.
21. *See, e.g.,* Humphrey v. Cady, 405 U.S. 504 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966).
22. 407 U.S. 245, 252 (1972).
23. *Id.* at 255.
24. *See* note 21 *supra.*
25. 386 U.S. 605 (1967).

that due process requires, for the commitment of a criminal defendant to a mental institution, that the accused

> be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.[26]

Self-incrimination, however, was not an issue in *Specht*. Along with the guarantees of procedural due process—including self-incrimination—required in juvenile proceedings,[27] the restoration of procedural due process safeguards to the commitment of criminals for mental treatment, signals a realization that innovative rehabilitation programs in these areas have fallen short of expectations.[28] Treatment may possibly be minimal, if the institution is overcrowded and understaffed.[29] Transfer to a mental institution is also undesirable to many criminal defendants, partially due to the indeterminate sentence imposed, and partially due to the poor conditions existent at some institutions. These underlying circumstances must have had some influence on the Court's recent decisions in this area.

Courts have generally held that the compulsory order of a criminal defendant to submit to a mental examination is not within the scope of the privilege against self-incrimination.[30] Most of the decisions in this area, unlike *McNeil*, involved the situation

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26. *Id.* at 610. In United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966), the court, discussing the commitment procedures for a criminal sex offender to a mental institution for an indeterminate period, stated:

> [I]t is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner was therefore entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. . . .

Id. at 312 (Self-incrimination was not in issue).

27. *In re* Gault, 387 U.S. 1 (1967).

28. *Id.* at 22-29. *See also* George, *Due Process in Protective Activities*, 8 SANTA CLARA LAW. 133, 140 (1968).

29. Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964); the court, in reference to Patuxent Institution, stated:

> [d]eficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.

Id. at 516-17.

30. *See, e.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965). *See* cases cited in 8 J. WIGMORE, EVIDENCE, § 2265 (McNaughten rev. 1961).

where the issue of insanity was raised at the trial. The privilege has been denied by some courts on the rationale that a person's mental condition is real evidence, which is outside the scope of the fifth amendment privilege.[31] Another basis for denial is the waiver theory, that is, when the accused raises the defense of insanity, he waives any objection to a compulsory mental examination.[32] Several courts, where insanity was an issue at the trial, have rejected these views.[33] In the recent case of *Commonwealth v. Pomponi*,[34] the Pennsylvnia Supreme Court decided that decisions[35] of the United States Supreme Court had indicated that an accused's answers to a psychiatric examination should be considered testimonial in nature, and therefore, *Pomponi* concluded, the fifth amendment privilege may be invoked.[36] *Pomponi* further stated that:

> both the language of the fifth amendment and the interests it protects weigh against an extension of the automatic waiver to out-of-court psychiatric examinations. . . .[37]

Thus in the specific situation where insanity is an issue at the trial, there is some support for the view that, although an examination may be ordered, the accused need not answer any of the psychiatrist's questions.[38] The distinguishing aspect of an insanity issue at trial is that the answers to the psychiatrist's questions may clearly lead to a possible incriminating result if the question of insanity becomes determinative of the outcome of the trial.[39] However, where the mental examination is for the purpose of commitment of the criminal to a mental institution, the possible incriminating consequences may not be as clear, and may explain the majority's refusal to decide the fifth amendment issue in *McNeil*.

Not only is the type of information elicited important to whether the privilege may be invoked, but also to be considered in determining the applicability of the privilege are the consequences

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31. *See, e.g.*, Battle v. Cameron, 260 F. Supp. 804 (D.D.C. 1966); Earley v. People, 142 Colo. 462, 352 P.2d 112 (1960).

32. *See, e.g.*, State v. Swinburne, 324 S.W.2d 746 (Mo. 1959).

33. *See, e.g.*, People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964); Shepard v. Bowe, 442 P.2d 238 (Ore. 1968).

34. 447 Pa. 154, 284 A.2d 708 (1971).

35. United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966).

36. 447 Pa. 154, 159, 284 A.2d 708, 710 (1971).

37. *Id.* at 161, 284 A.2d at 711.

38. *But cf.*, Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L.J. 143 (1962); Note, *Mental Examinations of Defendants Who Plead Insanity: Problems of Self-Incrimination*, 40 TEMP. L.Q. 366 (1967); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671.

39. See Thornton v. Corcoran, 407 F.2d 695, 700 (D.C. Cir. 1969); Commonwealth v. Pomponi, 447 Pa. 154, 159-60, 284 A.2d 708, 710 (1971).

which may result from that information.[40] In concluding that the accused need not cooperate with the examining psychiatrist, the concurring opinion by Justice Douglas in *McNeil* made no distinction between statements which may be incriminating, in the sense of leading to evidence which may later be used against the person, and statements merely inquiring into the accused's mind to make a determination of defective delinquency.[41] The concurring opinion did point out possible incriminating consequences in the fact that the psychiatrist could ask questions concerning any previous criminal conduct, or that the examination was during a period when the accused was seeking post-conviction relief.[42] However, other language of the concurring opinion asserted that statements elicited from an accused which may be used to commit him to a mental institution are also within the scope of the privilege. Justice Douglas stated:

> Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault*, 387 U.S. 1, 49-50 . . . there is harm and self-incrimination whenever there is 'a deprivation of liberty'; and there is such a deprivation whatever the name of the institution, if a person is held against his will.[43]

It is further pointed out as a sanction opposed to the constitutional privilege, that if he speaks and is committed, the accused is no longer confined for any portion of his original sentence, but is now held for an indeterminate period.[44] Commitment of a criminal defendant to a mental institution for an indeterminate period is an incriminating consequence of answering a psychiatrist's questions.[45]

A report was never filed on the petitioner because the psychiatrist felt that he could not make a determination of defec-

40. Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648, 660-61 (1970).

41. 407 U.S. 245, 256-257 (1972).

42. *Id.* at 256.

43. *Id.* at 257.

44. *Id.*

45. The criminal defendant who must submit to a psychiatric examination after conviction to determine his place of confinement is still within the criminal justice system. *See* Specht v. Patterson, 386 U.S. 605 (1967). The civil commitment of an individual to a mental institution is outside the scope of the questions presented in *McNeil*. However, a strong argument could be made, based on the view espoused by Justice Douglas in *McNeil*, that the privilege of self-incrimination be extended to the ordinary civil commitment of an individual to a mental institution and its consequential deprivation of liberty.

tive delinquency without the accused's answering any questions.[46] A basic query is whether the statute is nullified by allowing the accused to remain mute, making a determination of defective delinquency impossible.[47] Apparently it only makes a determination more difficult, as shortly after this decision was handed down the policy at Patuxent was changed. Reports of non-cooperators are now made on the basis of prior records and histories, without personal interviews.[48] Also, the mere order of the accused to be present at an examination does not violate the privilege.[49] Therefore, the psychiatrist may file a report based on his observation of the accused, since this type of evidence is real or physical evidence, which is outside the scope of the privilege.[50]

The accused in *McNeil* was to be examined by a psychiatrist, the results of which would determine his place and length of confinement and not whether he might be confined at all.[51] This distinction should not defeat the privilege. The better view would be to allow the privilege to enhance the individual's control over his own situation, based on his own view whether the particular disposition the state is asserting is the proper one for him.[52] As confinement for an indeterminate period to Patuxent is highly undesirable for some, the result of answering may be viewed as more serious than if the result were the ordinary criminal consequences. A meaningful privilege against self-incrimination for the criminal defendant would encompass the incriminating consequence of being committed to a mental institution for an indeterminate period.[53]

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46. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 246 (1972).
47. *See* Tippett v. Maryland, 436 F.2d 1153, 1162 (4th Cir. 1971) (concurring opinion).
48. Washington Post, Oct. 5, 1972, at L1, col. 7.
49. *See, e.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968).
50. *See* Commonwealth v. Pomponi, 447 Pa. 154, 284 A.2d 708 (1971).
51. Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648, 665-66 (1970).
52. *Id.* This view is based on the rationale of the various purposes of the privilege. For a discussion of the policies of the privilege, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
53. Whether a criminal defendant may invoke the privilege against self-incrimination during a compulsory psychiatric examination will eventually have to be decided. The same day *McNeil* was decided, the Court dismissed writ of certiorari to a comprehensive challenge of the Maryland Defective Delinquency Law, on the grounds that it was improvident since civil commitment procedures in Maryland were being revised at the time. One of the contentions was the denial of the right against self-incrimination. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 356 (1972) (J. Douglas, dissenting).

ENVIRONMENTAL LAW—CAUSE OF ACTION UNDER FEDERAL COMMON LAW FOR POLLUTION OF INTERSTATE WATERS

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)

The United States Supreme Court, in *Illinois v. City of Milwaukee*,[1] established a cause of action in aggrieved states, under the federal common law of nuisance, for the pollution of interstate waters by citizens of another state. By this decision the Court negatived the effect of *Ohio v. Wyandotte Chemicals Corp.*[2] which had denied states access to the federal courts for environmental suits when their action could not be founded upon statutory law.

In *Illinois*[3] the state of Illinois sued four Wisconsin cities and two local sewerage commissions for their pollution[4] of Lake Michigan. Neither federal statutes nor the law of the state of Wisconsin provided a remedy for Illinois whose statutory law[5] prohibited the defendants' polluting discharges. Illinois sought to invoke the original jurisdiction of the United States Supreme Court on the basis that the action was one in which a state was a party[6] and also that since Wisconsin municipalities were parties that the action was being brought against that state.[7] Illinois asked the Court to abate the nuisance arising from defendants' pollution of Lake Michigan. The Court, in a unanimous decision, speaking through Mr. Justice Douglas, held that when interstate water is polluted an action arises under the common law of the United States and the parties have federal question jurisdiction in the federal district courts.

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1. 406 U.S. 91 (1972).
2. 401 U.S. 493 (1971).
3. 406 U.S. 91 (1972).
4. Illinois alleged that the cities and sewerage commissions were discharging 200 million gallons of sewerage into Lake Michigan each day. *Id.* at 93.
5. It is a public nuisance: To corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others. ILL. ANN. STAT. ch. 100½ § 26 (3) (1972).
6. "In all Cases . . . in which a state shall be Party, the Supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2.
7. "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states." 28 U.S.C. § 1251 (a) (1) (1970).

Recently the United States Supreme Court, in *Ohio v. Wyandotte Chemicals Corp.*,[8] ruled upon facts strikingly similar to those of the instant case. In *Wyandotte* the state of Ohio asked the Court to exercise its original jurisdiction, on the grounds that a state was a party,[9] to abate the pollution of Lake Erie by the defendant corporation. As in *Illinois* federal statutory law provided no relief for the plaintiff. The Supreme Court declined to exercise its discretionary original jurisdiction[10] on the basis that the issues raised by *Wyandotte* were "bottomed on local law"[11] and that the Court was "ill equipped for the task of fact finding."[12] Mr. Justice Harlan, speaking for the Court, expressed a preference for appellate matters of "federal law and national import."[13] In a vigorous dissent, Mr. Justice Douglas stated that the *Wyandotte* issues presented "a classic type of case congenial to [the Supreme Court's] jurisdiction"[14] which "implicate[d] much federal law."[15]

The impact of the *Wyandotte* decision in foreclosing the Supreme Court as a forum for state actions against citizens of other states polluting common waters was to limit the aggrieved state to several unsatisfactory alternatives. The complaining state may bring the action in its own courts in protection of its own proprietary and quasi-sovereign interests[16] or as *parens patriae* to protect the health and welfare of its inhabitants.[17] The effectiveness of this approach, however, is undermined by the lack of compulsion upon the state in which the defendants reside to enforce the plaintiff state's injunction.[18] In addition, if the court of the plaintiff state anticipates this refusal to cooperate it may not issue the injunction, since equity courts may refuse to issue injunctions where it is likely that they will not be enforced.[19] However, if the suffering state brings its action in the courts of the foreign state

8. 401 U.S. 493 (1971).
9. U.S. CONST. art. III, § 2, cl. 2, note 6 *supra*.
10. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 503 (1971).
11. *Id.* at 497.
12. *Id.* at 498.
13. *Id.*
14. *Id.* at 505 (dissenting opinion).
15. *Id.* at 507 (dissenting opinion).
16. The nature of a state's quasi-sovereign interest in land was defined in Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), where the Court said, "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."
17. In such an action the State presents itself as the trustee, guardian or representative of all its citizens. Louisiana v. Texas, 176 U.S. 1, 19 (1899).
18. *See generally* RESTATEMENT (SECOND) CONFLICT OF LAWS § 102 (1971).
19. Reluctance to grant relief in these cases (where the defendant resides in another state) is also based on the fear of interfering unduly with the affairs of the other state. RESTATEMENT (SECOND) CONFLICT OF LAWS 94, Comment (Tent. Draft No. 4, 1957).

where the defendants reside, it will incur the disadvantage of seeking redress in the defendants' own courts. This strategic difficulty is a policy reason for the availability of federal jurisdiction where this circumstance arises.[20]

The federal district courts have original jurisdiction when a state brings an action against a citizen of another state.[21] Unlike the original jurisdiction of the Supreme Court, however, the jurisdiction of the federal district courts is restricted by statutory requirements.[22] The federal district courts do not have jurisdiction unless the parties are of diverse citizenship,[23] or the action involves a question of federal law.[24] A state does not qualify as a "citizen" for the purposes of diversity of citizenship jurisdiction.[25] The *Wyandotte* decision had temporarily foreclosed the contention that a federal question is presented by the pollution of interstate waters when the complaint is "bottomed upon local law,"[26] rather than federal statutory authority. Hence the effect of *Wyandotte* was to deny access to the federal district courts to aggrieved states seeking to enjoin citizens of another state from polluting common waters when there was no violation of federal statutory law.

In *Illinois*[27] the plaintiff attempted to evade the impact of *Wyandotte* by arguing that the original and exclusive jurisdiction[28] of the Supreme Court should be invoked on the basis that the state of Wisconsin was subject to a permissive joinder. Mr.

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20. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475-476 (1793).

21. 28 U.S.C. § 1332 (a) (2) note 23 *infra.*

22. 28 U.S.C. §§ 1331, 1332 notes 23-24 *infra.*

23. 28 U.S.C. § 1332 (a) (1970):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —(1) citizens of different states; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different states and in which foreign states or citizens or subjects thereof are additional parties.

24. 28 U.S.C. § 1331 (a) (1970):

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

25. Petroleum Exploration v. Public Service Comm'n, 304 U.S. 209, 217 (1937); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 27, 29 (1933); Puerto Rico v. Russell & Co., 288 U.S. 476, 484 (1932); Postal Tel-Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

26. 401 U.S. 493, 497 (1971).

27. 406 U.S. 91, 94 (1972).

28. 28 U.S.C. § 1251 (a) (1) note 7 *supra.*

Justice Douglas, speaking for the Court, rejected this contention,[29] declining to extend to merely permissive joinder[30] the rule that mandatory joinder is sufficient to obtain jurisdiction of the Supreme Court.[31]

Wyandotte had implicitly held that there was not an alternate federal forum to the Supreme Court for the abatement of a public nuisance by an aggrieved state.[32] The *Illinois* Court, however, refused to be bound by this conclusion, stating that the *Wyandotte* decision was "based on the preoccupation of that litigation with public nuisance under [local] law, not the federal common law. . . ."[33] Mr. Justice Douglas, recognizing that seventy years of federal legislation culminating in the Federal Water Pollution Control Act[34] had authoritatively established that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution,"[35] held that federal common law controls the pollution of interstate waters.

Federal common law is established by the federal courts when the Constitution, treaties, and statues of the United States are silent as to the resolution of a federal question.[36] An important consideration in determining whether there is applicable federal common law is the extent to which the area is governed by federal statutes.[37] The Court carefully explicated the development of federal statutory law touching interstate waters, starting with the Rivers and Harbors Act of 1899[38] and culminating with the recent Federal Water Pollution Control Act.[39] Mr. Justice Douglas held that the legislative efforts reduce the pollution of interstate waters and the express declaration of the federal policy of protecting the rights of the states to control pollution[40] had established a right in an aggrieved state to abate a public environmental nuisance under the federal common law.[41] The federal right here in-

29. 406 U.S. 91, 97 (1972).
30. *Id.*
31. New Jersey v. New York, 345 U.S. 369, 374-375 (1953).
32. 401 U.S. 493, 497 (1971).
33. 406 U.S. 91, 102 n.3 (1972).
34. 33 U.S.C. § 1151 (1970).
35. 406 U.S. 91, 102 (1972).
36. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); Royal Indem. Co. v. United States, 313 U.S. 289, 296 (1941); Board of Comm'rs v. United States, 308 U.S. 343, 349-350 (1939); 15A C.J.S. Common Law 16 (1967).
37. Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); *see* Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942).
38. 33 U.S.C. § 407 (1970).
39. 33 U.S.C. § 1151 (1970).
40. 33 U.S.C. § 1160 (b) (1970):
Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action.
41. 406 U.S. 91, 104 (1972).

volved is that of a state to protect itself from environmental nuisances arising outside of its borders but affecting interstate waters. The Court established federal law responsive to the states' "federal rights," stating that the existing statutory law did "not necessarily mark the outer bonds of the federal common law"[42] but was useful as "guidelines in fashioning such rules of decisions."[43]

Although available only after a "long drawn out procedure"[44] a federal action for the abatement of a public nuisance in the form of the pollution of interstate waters is an authorized remedy under the Federal Water Pollution Control Act[45] and this statute provides a model for abatement actions under the federal common law. In addition, the environmental standards of the states themselves were deemed relevant by the Court, stating that "a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[46] The Court emphasized, however, that the pollution of interstate waters is to be controlled by federal rather than state law.[47] This federal preemption is consistent with the Court's belief that a "uniform rule of decision"[48] for resolution of interstate water pollution actions is necessary. The federal common law as fashioned by the federal district courts will replace the various state laws in the area of interstate water pollution.[49] Although the federal judges are to act largely on their own "informed judgments,"[50] uniformity is established in the sense that all actions brought in the district courts will be resolved according to the same body of fed-

42. *Id.* at 103 n.5.
43. *Id.*
44. 406 U.S. 91, 103 (1972).
45. 33 U.S.C. § 1160 (g) (1970):
If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Administrator—(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and (2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring suit on behalf of the United States to secure abatement of the pollution.
46. 406 U.S. 91, 107 (1972).
47. *Id.* at 103 n.5.
48. *Id.* at 105 n.6.
49. *Id.*
50. 406 U.S. 91, 108 (1972).

eral common law rather than the common and statutory laws of the particular states involved in the action.

In *Illinois*[51] the Supreme Court utilized well established principles of law to provide states with a means of enforcing their own environmental standards when they are compatible with federal law. The Supreme Court has long recognized that it possessed the jurisdiction to adjudicate the equitable rights of states in common waters.[52] In addition, a state may enjoin another state from using common waters so as to create a nuisance to the citizens of the aggrieved state.[53] However, in *Illinois* Mr. Justice Douglas, for the first time,[54] utilized these rules of law in circumstances where the citizens of one state were causing a nuisance in another state by polluting interstate waters. The Court's novel application of the federal common law of public nuisance pragmatically responded to the needs of the states for a forum in which to enforce their high quality water standards when the polluting acts were committed by citizens of another state. Mr. Justice Douglas held that the District Court had original jurisdiction of the State of Illinois' action against the City of Milwaukee as the suit arose under the laws of the United States.[55]

Even though the parties in *Illinois*[56] were political entities, it may be argued that the Court's reasoning would support an action by an individual[57] in federal court for abatement of a nuisance to his private property arising from the pollution of interstate waters. Theoretically, the action brought by the State of Illinois was a private rather than a public nuisance action,[58] although "public" waters were polluted. A private nuisance action is brought by one sovereign entity or individual against another to force abatement of a continuous non-trespassory invasion of his right to the use and enjoyment of his property.[59] A public nuisance, however, is an offense against the state, and therefore is subject to abatement by action of the proper government agent.[60]

The Federal Water Pollution Control Act[61] apparently recog-

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51. *Id.*

52. Arizona v. California, 373 U.S. 546, 562 (1962); Nebraska v. Wyoming, 325 U.S. 589, 610 (1945); Kansas v. Colorado, 206 U.S. 46, 86 (1907).

53. New Jersey v. New York City, 283 U.S. 473, 481-482 (1931); New York v. New Jersey, 256 U.S. 296, 313 (1920); Missouri v. Illinois, 200 U.S. 496, 520-521 (1906).

54. Although this was a novel application by the Supreme Court, the same approach had been taken in Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

55. 28 U.S.C. § 1331 (a) note 24 *supra.*

56. 406 U.S. 91 (1972).

57. McMahan, *The New Federal Common Law*, 13 FOR THE DEFENSE 7, 84 (1972).

58. *Id.*

59. RESTATEMENT OF TORTS, § 822 (1939).

60. *Id.* at Explanatory Notes Ch. 40, 217 (1939).

61. 33 U.S.C. § 1151 (1970).

nizes this distinction and provides that under proper circumstances an aggrieved state may petition the United States Attorney General to bring suit on behalf of the United States to abate a public nuisance arising from the pollution of interstate waters.[62] In *Illinois*, however, Mr. Justice Douglas recognized that in the context of interstate water pollution the States have retained "quasi-sovereign interests"[63] and that the aggrieved state may maintain an action in federal district court for abatement of the nuisance. In other words, the State of Illinois as sovereign owner of the public waters within its borders, brought an action against the City of Milwaukee, Wisconsin for abatement of its pollution of Lake Michigan. The *Illinois* Court by holding that the district court has the power to abate interstate water pollution impliedly recognized that the action was one of private nuisance.

This distinction between private and public nuisance is significant since an individual property owner may bring an action for abatement of a private nuisance while generally only the state may force abatement of a public nuisance.[64] Permitting an individual who owns property along interstate waters to seek an injunction in federal court against another individual, in another or the same state, to abate the nuisance arising from the pollution of the waters would provide a more effective remedy in those states with comparatively low water pollution standards since the federal judges are not bound by the state standards.[65] In addition, because of the great confusion among the states concerning the term nuisance,[66] federal courts implementing federal common law may alleviate the plight of environmental lawyers who have had only limited success in state courts in attempts to fashion private remedies for pollution out of the existing common law of nuisance.[67]

In *Illinois v. City of Milwaukee*[68] the Supreme Court established a cause of action, under the federal common law of nui-

62. 33 U.S.C. § 1160 (g) note 45 *supra.*
63. 406 U.S. 91, 104 (1972).
64. An individual may bring an action to abate a public nuisance only if he suffers special damage to his private interests. RESTATEMENT OF TORTS, Explanatory Notes Ch. 40, 217 (1939).
65. *See* note 47 and accompanying text *supra.*
66. RESTATEMENT OF TORTS, Explanatory Notes Ch. 40, 216 (1939); In W. PROSSER, LAW OF TORTS 571 (4th ed. 1971) it is said that, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'."
67. McMahan, *The New Federal Common Law*, 13 FOR THE DEFENSE 7, 84 (1972).
68. 406 U.S. 91 (1972).

sance, for an aggrieved state against the citizens of another state who pollute common waters. The decision reverses the effect of *Ohio v. Wyandotte Chemicals Corp.*[69] in foreclosing the federal courts as a forum for these suits by a state. No longer will states with high quality water standards be without a remedy against citizens of neighboring states with lesser standards who pollute common waters. Theoretically, the decision allows an action in federal district court by a private individual for abatement of a nuisance to his land arising from the pollution of interstate waters. Such an interpretation would provide an alternative remedy for individuals in states which do not have adequate legislative or judicial machinery for pollution abatement.

CHARLES W. WATSON

69. 401 U.S. 493 (1971).